A Pamphlet

having the purpose to inquire

(1) Whether an administrative bureau, such as the Interstate Commerce Commission, is the only sort of tribunal upon which the correction of unreasonable interstate railroad rates can be devolved.

(2) Whether the courts may not be authorized, when they condemn a rate as unlawful, to decide what is lawful and to enforce that decision under similar conditions in the future.

WALKER D. HINES.

Louisville, Ky.
June 24, 1905.

The advocates of additional Federal regulation of railway rates point out that Section 1 of the Act to Regulate Commerce prohibits unjust and unreasonable rates, and that Section 3 forbids any common carrier to give any unreasonable preference to any person, locality or description of traffic; that to enforce adequately these prohibitions it is necessary to confer upon some appropriate tribunal the power not only to decide what rates or rate adjustments constitute violations of these provisions of the law, but further to decide the extent to which the rates or rate adjustments so condemned are violative of the law and to require the carrier to substitute for the rates so condemned rates modified to the extent thus indicated by this tribunal.

Even assuming the premises thus stated to be correct, the question remains, What is the appropriate tribunal for carrying out this plan? The only two tribunals which have been suggested are the courts on the one hand and an administrative bureau, such as the Interstate Commerce Commission, on the other hand. It is freely asserted by those who favor conferring the power suggested upon the Interstate Commerce Commission or some other administrative bureau that this course must be pursued, because no such power can be constitutionally conferred upon or exercised by the courts. This paper is addressed to a consideration of the validity of this assertion.

I

It is a well-known principle of the common law that the rates of a common carrier must be just and reasonable, and Section 1 of the Interstate Commerce Act simply declares this common-law principle and expressly applies it to Interstate Commerce.

To decide upon the evidence, in a duly presented case, whether any rate charged by a common carrier and involved in that case is reasonable. and, if unreasonable, what is the reasonable rate, is essentially a judicial function.

> "In the absence of any legislative regulation upon the subject, the courts must decide for it (the railroad company), as they do for private persons when controversies arise, what is reasonable." (Chicago, etc., R. R. Co. v. Iowa, 94 United States, 155, 161.)

> "The question of the reasonableness of a rate of charge for transportation by a railroad company, involving, as it does, the element of reasonableness both as regards the company and as regards the public, is eminently a question for judicial investigation, requiring due process of law for its determination." (Chicago, etc. R. R. Co. v. Minnesota, 134 United States, 418, 458.)

> "Yet it has always been recognized that if a carrier attempted to charge a shipper an unreasonable sum, the courts had jurisdiction to inquire into that matter and to award to the shipper any amount exacted from him in excess of a reasonable rate; and also in a reverse case to render judgment in favor of the carrier for the amount found to be a reasonable charge." (Reagan v. Farmers Loan & Trust Co., 154 United States, 362, 397.)

It can therefore be accepted as established that it is appropriate for a court to enforce, as to past services by a common carrier, either the common law or the statutory declaration that rates must be just and reasonable, and in doing so, to decide, when necessary, what is the maximum reasonable rate which could lawfully have been charged for the past services under consideration.

So far there is no disagreement. But it is confidently contended that if, after having decided what is the maximum reasonable rate which the common carrier may lawfully charge, the court then attempts to compel the common carrier to observe that maximum for like services for the future, the court goes

entirely beyond the confines of the judicial power, and that such interference with the rates of the common carrier for the future is so essentially non-judicial that no power with respect thereto can be constitutionally conferred upon the court.

In other words, the argument is that while the courts have full power to enforce the shipper's common law or statutory right for the past, they have no power whatever to give him a corresponding measure of protection for the future. In its last analysis this proposition must resolve itself into the claim that as to the rates of a common carrier courts of law may, in actions as to past transactions, accord to a shipper the benefit of the lawful maximum rate which he should have been charged; but, although this remedy may involve such a great multiplicity of suits as to be wholly inadequate, nevertheless a court of equity is utterly powerless to intervene and give him, by way of injunction, an adequate remedy to secure that to which he is entitled under the law. If such is the state of the law, then the right which a shipper has under the law to pay only just and reasonable rates for the services of a common carrier is subject to a most remarkable, exceptional qualification in the matter of remedies, which it is believed does not exist with respect to any other right which the law prescribes, and courts of equity labor under a striking and exceptional limitation of their jurisdiction and powers with respect to this single subject of the legal duty of common carriers to charge only just and reasonable rates for their services.

There is a widely prevalent impression that any interference with the rates of a common carrier for the future is in effect the making of a law for the future, which can not be undertaken by the courts. This view, however, loses sight of a vital point. Congress has already made the law that rates shall not be unjust and unreasonable or unduly preferential. Any rate that is unjust and unreasonable is illegal to the ex-

tent that it is unjust and unreasonable; and any rate adjustment which is unduly preferential is illegal to the extent that it works an undue preference. It is necessarily a judicial function to decide whether the rate as it stands violates the law as it stands, and if so, the extent to which it violates the law. To give a future effect to a judicial decision of this judicial question is not making a law for the future, but is merely compelling the carrier to observe for the future the law which has been made by Congress. In rendering such a decision, a court would not act upon the individual views of public policy and business expediency which might be entertained by the members of the court, or upon the general knowledge which the court might think it possessed upon the broad subject of railroad rates; the court would simply consider whether the legal evidence introduced was sufficient to show that the rate under consideration was in violation of the law of Congress, and if so, the extent of the violation. In giving a future effect to such a decision the court would not fix what must be done for all time to come, but merely until conditions so change as to render lawful that which the court found at the time to be unlawful.

Remembering, then, that all that a court can do is to decide, in the exercise of a strictly judicial discretion and solely upon legal and sufficient evidence, whether the rate challenged violates the law made by Congress, and if so, the extent to which such rate is unlawful, the question remains whether it is compatible with the judicial function for a court to give a future effect under similar conditions to its decision that the rate under consideration is unlawful to a certain extent.

As, in the discussion of this question, it is so habitual to attribute some mystery or magic to a railroad rate for the future which entirely removes it from the sphere of judicial action, it seems necessary to consider the matter in a somewhat detailed way.

II.

Of course, when a court determines upon the evidence before it that to a certain extent the rate under consideration is contrary to the law, its determination is necessarily based upon facts which have already taken place. In other words, the court's decision rests upon past occurrences. It seems frequently to be assumed that this fact of itself renders the court incapable of giving any future effect to its decision, the idea being apparently that as conditions may change in the future the court's decision would become inapplicable and if made effective the result would be that the court would really be making a law for the future; and it is sometimes said that the judicial function is confined to deciding whether past transactions are in conformity to law, while it is essentially legislative to declare what transactions shall be lawful in the future. This view, however, is incomplete and fallacious. A court of equity never grants an injunction that does not have a future effect, and yet every such decree must rest upon evidence which is necessarily based upon past transactions.

Questions of continuing right generally depend upon questions of fact which are rarely permanent and unchangeable, but courts do not hesitate to exercise their admitted jurisdiction to compel the observance of rights and duties for the future simply because conditions may change. Thus in the case of Smyth v. Ames, 169 U. S. 466, the court held that certain rates fixed by the Legislature of Nebraska and sought to be enforced by the Nebraska Board of Transportation were unlawful because confiscatory in their effect upon the railroads involved. This decision was necessarily based upon the past transactions and conditions which were presented in evidence to the court, but the only effective relief was to grant an injunction against enforcing these rates for the future. If

the mere fact that conditions might change had operated to prevent the court from giving any future effect to its decree, the decision would have been worthless. The court, however, recognized no such disability, but proceeded to grant the injunction for the future. At the same time it expressly recognized that it was a case where conditions were likely to change, and therefore provided in the decree for application to the court for a modification of the decree if circumstances should so change as to deprive the rates of their confiscatory character. (See 169 U. S. 549-550.)

Another case of this character is the case of United States *ex rel.* Kingwood Coal Company v. West Virginia Northern Railroad Co. In this case the Circuit Court not only decided that the apportionment of cars among various coal companies worked an undue prejudice to the relator under the Act to Regulate Commerce, but it went further and decided what apportionment would be lawful, and granted a writ of mandamus to require the observance of that apportionment for the future. This decision was based upon the conditions in that coal field as shown by the record at the time the decision was rendered. These conditions were liable to change at any time, yet the court required for the future a specific apportionment of cars based on what would have been proper in the past. (See 125 Fed. Rep. 252.) This case has been recently affirmed by the Circuit Court of Appeals, but the decision of the latter court has not yet been reported.

Numerous cases can be found where courts of equity have granted injunctions, which have become inoperative or subject to modification by reason of a subsequent change in conditions. Some courts hold that where conditions so change as to make the injunction no longer applicable, the parties enjoined can, at their own peril, disregard the injunction of the court, and will not be held guilty of contempt if the court finds that the

conditions have so changed as to justify the dissolution of the injunction. On the other hand, some courts hold that in such a case the parties must first show to the court the change in conditions, and apply to the court for a dissolution or modification of the injunction before they will be justified in disregarding it. But all such cases show that the mere fact that conditions may change in the future, does not disable a court from giving a future effect to a decision based upon past transactions.

It is, therefore, clear, that the fact that conditions affecting the lawfulness of railroad rates may change in the future, in no way impairs the right of the courts to give a future effect to their determination in regard to what rates are lawful.

III.

Nor is there any basis for the peculiar idea that railroad rates constitute an exception to the general powers of a court of equity, and that they are in their nature free from judicial control for the future.

Certainly, at common law, the common carrier was never regarded as enjoying immunity from the comprehensive and effective future regulation of a court of equity with respect to its rates. In the case of Scofield v. Lake Shore & M. S. R'y Co., 43 Ohio St. 571, 3 N. E. Rep. 907, the Supreme Court of Ohio granted an injunction compelling the defendant railway company to accord to the plaintiff the same rates that it accorded to some of his competitors in the oil business, and cited numerous other cases where common carriers had been required by injunction to comply for the future with their common-law or statutory duties. In this case, the court simply found what was the common-law duty of the railway company in the matter of rates for the plaintiff under the circumstances presented in the record, and then proceeded, in the ordinary

exercise of its functions as a court of equity, to compel the observance of those duties for the future.

Nor does the Act to Regulate Commerce proceed upon the theory that the future rates of a common carrier are so peculiar as to be exempt from the control of a court of equity. On the contrary, Sections 15 and 16 of that Act clearly contemplate that the Interstate Commerce Commission may condemn an existing rate as unreasonable and order its discontinuance, and by a proceeding in the Circuit Court of the United States as a court of equity secure a decree enjoining obedience to that order. Such a decree could have only a future operation, and would have the necessary result of making it unlawful for the common carrier to charge for the future the rate which the Commission and the court had condemned as unlawful upon the evidence presented. In Interstate Commerce Commission v. C. B. & Q. R. R., the point was made that this procedure could not be employed and enforced by the court, because it did affect the rate for the future and indirectly establish a maximum rate for the future. The Circuit Court expressly decided that this point was not well taken, and that it was the duty of the court, in a proper case, to compel the discontinuance for the future of a rate found to be unlawful. (See 94 Fed. Rep. 272.) This case, after being decided adversely to the Commission on the facts, by the Circuit Court and Circuit Court of Appeals (98 Fed. Rep. 173; 103 Fed. Rep. 249), went to the Supreme Court of the United States, and that court clearly assumed that the order of discontinuance made by the Commission was within its power and that it was the duty of the courts to enforce that order if reasonable on the facts. That court held that in some vital respects "the order of the Commission was not sustained by the facts upon which it was predicated," but in effect referred the case back to the Commission for further proceedings, expressly recognizing the

right of the Commission, through the courts, to correct for the future "any unreasonableness in the rate." (See 186 U. S. 320.)

In Interstate Commerce Commission v. C., N. O. & T. P., 162 U. S. 184, the Supreme Court affirmed a decree compelling a carrier to discontinue for the future what the court found to be a violation of the long aud short haul section. The decision in this case was based upon existing conditions, which in the future might change and render lawful what the court found to be unlawful and prohibited. While the Supreme Court has in numerous other cases reversed decrees of the lower courts compelling carriers to discontinue for the future various rates or rate adjustments found to be in violation of the law, it has never in any case suggested that the mere fact that the decree of the court had a future operation and would necessitate a change in the rates of the carrier for the future in any way impaired the court's jurisdiction in the premises.

In Missouri Pacific Ry. v. United States, 189 U. S. 274, a bill was filed by the United States alleging that rates from St. Louis to Wichita and from St. Louis to Omaha over the lines of the Missouri Pacific were so adjusted as to constitute an undue prejudice against the city of Wichita, and a perpetual injunction was sought restraining the railway company from continuing to exact greater rates from St. Louis to Wichita than from St. Louis to Omaha. The Supreme Court held that such a bill could be maintained. To determine the controversy thus presented, it would be necessary for the court to decide upon a complicated state of facts,as those facts existed when the proof was taken, whether a greater rate to Wichita than to Omaha constituted a violation of Section 3 of the Act to Regulate Commerce, and if it so found it would be necessary for the court to grant an injunction requiring the carrier for the future to cease charging any more to Wichita than to Omaha.

Indeed, the most vital feature of the Act to Regulate Commerce is the plan of correcting through the court, for the future, rates which the court finds upon the evidence before it to be unlawful. The right of the courts under the Act to Regulate Commerce to determine whether the rates under consideration are unlawful, and if so to order their discontinuance for the future, is thus not only expressly recognized by Congress, but has been frequently exercised and habitually recognized by the courts.

Thus, under the Act to Regulate Commerce, the courts may do at least these two things :

First, the courts may decide (necessarily upon past transactions and conditions as a basis) whether a challenged rate is unlawful because unjust and unreasonable, or unduly preferential.

Second, the courts may compel the carrier to cease for the future to impose the rate so found to be unlawful for the past.

To illustrate, let us suppose a rate of 50 cents per hundred pounds is challenged as unreasonable and therefore contrary to law. The evidence shows the court that for the period covered by the evidence, which is necessarily all in the past, 40 cents per hundred pounds was the highest rate that was reasonable and therefore lawful. Under the Act to Regulate Commerce the court can, on this evidence, declare the rate of 50 cents to be unreasonable and unlawful. This decision is based upon the belief of the court that 40 cents per hundred pounds is the highest rate that would be lawful. Clearly, if it is a judicial function to decide in such a case that 50 cents is unlawful because in excess of 40 cents, it would be equally a judicial function to decide that anything in excess of 40 cents is unlawful. Indeed, at common law the courts have always assumed the power to decide in an action at law that such a rate was unlawful to the extent that it exceeded the highest

rate which in the opinion of the court could lawfully be charged, and to award a judgment for the excess. Hence it involves no departure from what is already firmly established to say that it is a judicial function for the court to determine the extent to which a rate under consideration by it is in violation of the law.

In the case of the rate referred to, the court could, under the Act to Regulate Commerce, after having found that 50 cents per hundred pounds was unlawful, grant an injunction compelling the carrier to discontinue charging 50 cents for the future. This is the remedy which the Act expressly provides and which the courts have repeatedly employed. The actual legal effect of this injunction is to prevent the carrier from charging for the future 50 cents per hundred pounds or more than 50 cents. Can it be any less a judicial function for the court, in the same case, to order the carrier not to charge any rate which exceeds 40 cents per hundred pounds, which is what the court finds on the evidence is the highest lawful rate that can be charged? It is impossible to find any distinction between these two orders which would place the order prohibiting the charging for the future of a rate as high as 50 cents per hundred pounds in the category of judicial functions, and the order prohibiting the charging of a rate for the future in excess of 40 cents per hundred pounds in the category of functions essentially non-judicial. No legal argument can be advanced against the power of a court to make the latter order, which would not also apply with equal effect against the power of the court to make the former order.

Of course the courts have never, under the Act to Regulate Commerce, undertaken to go beyond merely ordering the discontinuance of the rate found to be unlawful; but this is because the statute only provides for this purely preventive procedure. The whole proceeding under the Act is, of course,

statutory in character, and the courts have only undertaken to enforce the Act in the statutory method.

It is, therefore, apparent that the rates of common carriers are not exempt from judicial control for the future; but that, on the contrary, it is entirely compatible with the judicial function for the courts, upon finding that existing rates of a common carrier are in violation of the rights of shippers under the law, on the existing facts as shown to the court, to compel those rates to be changed for the future to whatever extent the court may find those rates to be unlawful. Any argument which would defeat this conclusion would defeat the judicial procedure established by the Act to Regulate Commerce and habitually recognized and enforced by the courts.

IV.

It is believed that the only case directly discussing and disposing of the question of the power of a court under legislative authority to ascertain what is the maximum reasonable rate which may be charged a patron by a quasi-public corporation, and to enforce that rate for the future, is the case of Janvrin v. Revere Water Company, 174 Mass. 514 (55 N. E. Rep., 381). A statute of Massachusetts required water companies within a given district to furnish their patrons with water at a reasonable rate, and provided that the selectmen of a town or any persons deeming themselves aggrieved might, in stipulated years, apply by petition to the supreme judicial court, which, after hearing the parties, should establish such maximum rate as it might deem proper, and that such rate should be binding upon the water companies until revised or altered by the court pursuant to the Act. Upon such application to the court a demurrer was interposed on the ground that the statute conferring power on a court to determine rates

for the future was unconstitutional, because imposing non-judicial functions upon the court. The demurrer was overruled.

The court pointed out that the statute called upon it to deal "with the relations between actual water-takers and the company." Further on the court added:

> "It (the statute) calls on us to fix the extent of actually existing rights. With regard to such rights judicial determinations are not confined to the past. If it legitimately might be left to this court to decide whether a bill for water furnished was reasonable, and if not, to cut it down to a reasonable sum, it equally may be left to the court to enjoin a company from charging more than a reasonable sum in the immediate future."

This quotation squarely disposes of the peculiar idea that the intervention of the mere element of futurity destroys the judicial character of the task which the court performs.

Concerning the complexity of the inquiry, the court said:

> "It is suggested that the duty to be done by the court sitting with two justices, under this statute, calls for an investigation of details and the consideration of matters of administration which can not properly be required of the supreme judicial court. If an extended investigation of accounts or an examination of minute details is necessary in the hearing upon this petition, it will be in the power of the court to appoint a master, in accordance with the practice of the court in equity, to hear the parties and report the facts."

This statute contained the peculiar provision that the rates determined by the court should remain in effect for five years, thus restricting the power of the court to modify those rates upon change of conditions. But the court held that even this limitation did not make the statute unconstitutional, and said:

> "But supposing a party aggrieved should obtain an injunction, obviously the decree would be drawn so as to bind the defendant for a reasonable time, or if it were drawn in the common form, subject to review on a change of circumstances, the court would not be likely to grant leave to file a bill of review until a reasonable time had

> elapsed; and if the legislature should say that in these cases five years was a reasonable time, we could not say that it was wrong."

The court thus disposes of every argument which could be offered against the constitutionality of conferring upon a court the power, in a duly litigated case and with respect to the actually existing rights before the court, to determine what is the maximum lawful rate and to give a future effect to that determination, either for a reasonable time or so long as conditions should remain substantially unchanged or during such time as the legislature might itself declare was a reasonable time.

The statute under consideration in the Janvrin case provided that the rate to be fixed by the court was to be "a reasonable sum measured by the price ordinarily charged for a similar service in other cities and towns in the metropolitan district." This was referred to by the court not as strengthening the position that the function exercised was judicial, but because the respondents contended that this invalidated the statute, as it was an attempt to let one company fix a price for another. But the court held that this was merely requiring the consideration of instructive evidence.

Clearly this provision as to evidence does not in any way enlarge or strengthen the judicial character of the work. Any court, in passing upon what is a lawful rate for a service by a quasi-public corporation, whether for the past or for the future, under similar conditions, is, of course, restricted to legitimate evidence as to what is reasonable. It can not go, as a legislature or a commission does, into general questions of policy, but is bound to rely upon established standards of what is reasonable for the particular service. Whatever difficulty there may be in determining or applying these standards exists just as fully with reference to passing upon what is

a reasonable rate for a past service as to determining what is the reasonable rate that shall apply under similar conditions for the future, and in no wise impairs the judicial character of the function.

V.

But it is sometimes said that in any event the power to determine what is the maximum lawful rate, and to give a future effect to that determination, could be conferred upon and exercised by a court only in litigated cases involving actually existing rights, and that no general effect, or effect beyond the rights actually before the court, could be constitutionally given for the future to the court's determination. In this connection the following language from the Janvrin case, *supra*, has been quoted :

> "It is with the relations between actual water-takers and the companies that the statute calls on this court to deal. It does not undertake merely to make of the court a commission to determine what rule shall govern people who are not yet in relation to each other, and who may elect to enter or not to enter into relations as they may or may not like the rule which we lay down ; it calls on us to fix the extent of actually existing rights. . . . . It will be understood from the reason on which we sustain the act that the court would not regard itself as warranted or called on to undertake the fixing of rates except so far as they concern interests actually and legitimately before the court."

The clear meaning of the language quoted, especially when considered with the opinion as a whole, is that the court can not be called upon to act unless such action is necessary to protect rights secured by law to interests which are actually and legitimately before the court. No one would deny this proposition.

While the question whether the rate fixed by the court at the instance of the actual interests before it would be binding as a general rate was not decided, because not necessarily involved, the court strongly intimated that in its opinion such rate so determined would be binding as a general rate. On this point the court said :

> "And we feel bound to assume, in support of the act, that the legislature is dealing primarily with the rights of the party aggrieved before the court, and only secondarily adopts in advance the rate thus fixed between the parties as a general rate for all. If this is so the question whether such a legislative consequence can be attached to the decision is not before us. Even if it should fail, the failure would not necessarily affect the constitutionality of sending 'persons deeming themselves aggrieved' to this court to get their rights settled. But as it is not likely that a rate, thus established for a given moment after full investigation, would be departed from upon the application of a second person similarly circumstanced, it may be questioned whether there is anything to prevent the legislature from sanctioning, without further hearing, a rate which once has been declared judicially to be reasonable."

But while the supreme judicial court of Massachusetts thus left open the question whether the action of the court at the instance, or on behalf, of an aggrieved person would be binding generally, it is not believed that this is an open question under the "Act to Regulate Commerce" and the decisions enforcing that act.

Under Section 13 of that act, a complaint of its violation may be inaugurated, not only by an individual, firm or corporation, but also by associations and societies which have no legal entity, and also by bodies politic or municipal organizations or State railroad commissions, and also by the Interstate Commerce Commission itself, and it is expressly provided "that no complaint shall, at any time, be dismissed, because of the absence of direct damage to the complainant."

In Interstate Commerce Commission v. Baird, 194 U. S. 25, the court held that it was the duty of the Commission to entertain and pass upon a complaint filed under Section 13, whether the complainant had any real interest or not. Under Section 15, when the Commission, upon the investigation of any complaint, or upon inquiry upon its own motion, finds that a carrier is violating the law, whether by charging rates unreasonably high or otherwise, its order to cease and desist from such violation is not confined merely to the party aggrieved, if any, who has instituted the complaint, but is general, and requires a change in the rate, not merely for the party aggrieved, if any, but for everybody. Not only may any person or company interested in the Commission's order file a petition in the Circuit Court of the United States, sitting in equity, to secure its enforcement, but the Commission itself may do so, and in either case the decree of court is broad and general, and if it sustains and enforces the order of the Commission, requires the carrier to change the rates condemned for all persons, and not merely for the aggrieved person who has inaugurated the proceedings.

In the case of Interstate Commerce Commission v. C., N. O. & T. P. Railway, 162 U. S. 184, the complaint was originally made before the Commission by the James & Mayer Buggy Company, of Cincinnati, that they were aggrieved by the defendant railway company's charging more on buggies to Social Circle, an intermediate point, than to Augusta. The Commission investigated the circumstances and conditions under which the greater charge was made for the shorter than for the longer haul, and on the evidence as presented to it found that the carriers' practice was a violation of the law and ordered the carriers to discontinue that practice, not merely for the complainant, but generally. The Circuit Court of Appeals and the Supreme Court sustained the Commission on the question of fact, to wit, whether on the evidence in the record

the carriers were violating the law, and therefore decreed that the carriers should discontinue that violation of the law. Consequently the carriers were compelled to and did change their rates for the future, not merely for the James & Mayer Buggy Company, but generally. The fact that the suit was brought, not by the party aggrieved, but by the Interstate Commerce Commission, and that the relief sought and granted was not confined to the party aggrieved, but was general and necessitated a change in the rates of the carrier for all persons, was not thought either by the lower courts or by the Supreme Court to destroy or impair the judicial character of the task the courts were called upon to perform in that case.

In Missouri Pacific Railway Company v. United States, 189 U. S. 274, the court held that under the Elkins Act of February 19, 1903, it was the duty of the Circuit Court to entertain and pass upon a bill filed in the name of the United States by the District Attorney under the direction of the Attorney-General, and at the request of the Interstate Commerce Commission, which alleged that the rates from St. Louis to Wichita and Omaha respectively amounted to an undue prejudice to Wichita, contrary to the statute, and which prayed a perpetual injunction restraining the railway company from charging more from St. Louis to Wichita than from St. Louis to Omaha. Here the court was called upon to determine whether the respondent was violating the law, and if so, to compel it to cease such violation not merely for a single aggrieved party before the court, but to cease it altogether for everybody. The Supreme Court necessarily believed that the generality of the relief in no way impaired the judicial character of what the court was called upon to do.

Moreover, the courts have patiently considered and disposed of all the numerous cases which have been brought under the Act to Regulate Commerce to enforce orders of the Commission,

which required the general discontinuance of rates or rate adjustments found to be unlawful, and have never held or intimated that they were engaged in work which was essentially non-judicial because the relief sought was general in character and not confined to a particular aggrieved party initiating the complaint.

It must therefore be apparent that the judicial or non-judicial character of the determinations of the court with respect to the lawfulness of the rates of a common carrier under the Act to Regulate Commerce does not depend upon the special or general effect that may be given to the court's decree, and that the work of the court is judicial when its decree corrects the illegality in the rate of the carrier generally for everybody, just as much as it is judicial when the decree corrects the illegality merely for an aggrieved complainant.

VI.

But it is maintained that the courts have decided that the making of rates for the future is a legislative function. The most frequently cited authority to sustain this proposition is the following language from Interstate Commerce Commission v. C., N. O. & T. P. Railway Company, 167 U. S. 479:

> "It is one thing to inquire whether the rates which have been charged and collected are reasonable—that is a judicial act; but an entirely different thing to prescribe rates which shall be charged in the future—that is a legislative act. Chicago, Milwaukee &c. Railway v. Minnesota, 134 U. S. 418, 458; Reagan v. Farmers Loan & Trust Company, 154 U. S. 362, 397; St. Louis & San Francisco Railway v. Gill, 156 U. S. 649, 663; Cincinnati, New Orleans &c. Railway v. Interstate Commerce Commission, 162 U. S. 184, 196; Texas & Pacific Railway v. Interstate Commerce Commission, 163 U. S. 197, 216; Munn v. Illinois, 94 U. S. 113, 144; Peik v. Chicago & Northwestern Railway, 94 U. S. 164, 178; Express Cases, 117 U. S. 1, 29."

It will be helpful to see what was said in the authorities here cited upon this proposition.

In the three cases of Chicago &c. Railway v. Minnesota, 134 U. S. 418; C., N. O. & T. P. Railway v. Interstate Commerce Commission, 162 U. S. 196, and T. & P. Ry. v. Interstate Commerce Commission, 162 U. S. 216, there was no discussion of the proposition.

In Munn v. Illinois, 94 U. S. 113, the court was considering an act of the Illinois legislature which itself prescribed the maximum charge for the storage and handling of grain. It was insisted that even though the warehouse business might be clothed with a public interest so as to limit the owner's compensation to what was reasonable, yet what was reasonable was a judicial and not a legislative question. (Page 133.) The court pointed out that it had been customary for the legislature to fix maximum rates, and that it was only where this was not done that it was left to the courts to determine what was reasonable. All that the court determined was that there is a legislative power to fix maximum rates, and it expressly referred to that as "one of the means of regulation." The court did not hold that it was the exclusive means or that in the absence of such regulation a court could not in regularly litigated cases determine what were lawful rates and give them a future effect. The point was not involved or discussed in any way.

So in Peik v. Chicago, &c., Railway Company, 94 U. S. 164, 178, the court simply held that the legislature might fix maximum rates which would bind the courts as well as the people. It did not undertake to decide or consider what power might be exercised by the judiciary if the legislature did not fix maximum rates.

In the Express Cases, 117 U. S. 1, 29, the court simply held there was no rule either at common law or by statute

which required a railroad company to afford facilities to express companies on any terms whatever, and that the fixing of any rule on this subject "must come, when it does come, from some source of legislative power." This proposition is, of course, perfectly obvious. It is in no way inconsistent with the proposition that the courts may be authorized to compel the performance for the future by common carriers of their duty, which exists both at common law and by statute, to charge only reasonable rates for their services. Indeed, in the very next sentence in the Express Cases the court went on to say:

> "The legislature may impose a duty, and when imposed it will, if necessary, be enforced by the courts, but unless a duty has been created either by usage or by contract or by statute, the courts can not be called on to give it effect."

In Reagan v. Farmers Loan & Trust Company, 154 U. S. 362, 397, the court said:

> "It is doubtless true as a general proposition that the formation of a tariff of charges for the transportation by a common carrier of persons or property is a legislative or administrative rather than a judicial function. . . . . The courts are not authorized to revise or change the body of rates imposed by a legislature or the Commission; they do not determine whether one rate is preferable to another, or what, under all circumstances, would be fair and reasonable as between the carriers and the shippers; they do not engage in any mere administrative work."

And again, on page 400:

> "As we have seen, it is not the function of the courts to establish a schedule of rates. It is not, therefore, within our power to prepare a new schedule or re-arrange this. Our inquiry is limited to the effect of the tariff as a whole, including therein the rates prescribed for all the several classes of goods, and the decree must either condemn or sustain this act of quasi-legislation. If a law be

> adjudged invalid the court may not in the decree attempt to enact a law upon the same subject which shall be obnoxious to no legal objections. It stops with simply passing its judgment on the validity of the act before it. The same rule obtains in a case like this."

In this case the court was dealing with a schedule of rates made under legislative authority by the Railroad Commission of Texas, and the court's remarks were with reference to that subject-matter. The question whether, in a regularly litigated case, a court could be empowered to determine an actual and legitimate controversy between shipping interests on the one hand and a railroad on the other, and find the extent to which the rate under consideration violated the law, and enforce for the future the necessary correction of that illegality, was in no way involved in the Reagan case, and nothing said in that case is inconsistent with such a power on the part of the court. In that case the court was dealing with what was in effect a law of the State of Texas and, as it is pointed out, it could only hold that law invalid; it could not enact a new one.

In the Janvrin case, *supra*, the court announced its entire assent to the proposition stated in the Reagan case as above quoted, but pointed out the vital distinction between that proposition and the question with which it had to deal.

In St. Louis & San Francisco R'y v. Gill, 166 U. S. 649, 663, the court simply quoted the Reagan case. In the Gill case the legislature itself had established the tariff of rates which was under consideration.

Clearly, therefore, none of the authorities cited by the court in Interstate Commerce Commission v. C., N. O. & T. P. R'y, 167 U. S. 479, excludes the idea that, with reference to the subject-matter of a duly litigated case, a court may find the extent to which a given rate is unlawful, or in other words the maximum that is lawful, and give effect to that decision for the future. Nor did this case it-

self call for or contain any expression from the court on this proposition. The court was dealing not with the powers which could be exercised by or conferred upon a court, but with the powers which had been actually conferred upon the Interstate Commerce Commission—an administrative body. The entire proceeding was statutory. The suit could have been brought by the Commission only by virtue of the statute. A prerequisite to the bringing of the suit was a valid order of the Commission, and the question was, What order was the Commission authorized to make? The making of maximum rates by commissions was, as the court pointed out, a very usual practice in many of the States. Such making of rates was essentially legislative. In the case under consideration, the Interstate Commerce Commission had made an extensive tariff of rates upon a large number of articles, affecting numerous railroads and many different cities. The analogy to the making of tariffs of rates by State railroad commissions was very striking. It was perfectly natural that the court should treat this act of this Commission as an effort to assume, without authority, powers of a legislative character, and the court's discussion of the matter from the standpoint of the legislative making of rates under these circumstances certainly can not be regarded as an authoritative expression with reference to an essentially different question which was not presented to the court at all.

To give to the expressions of the court in the case last referred to the meaning that it is utterly unconstitutional for a court, in order to enforce the Act to Regulate Commerce, to be authorized in a litigated case to ascertain the extent to which a rate violates the law and must be changed to comply with the law and to enforce that determination under similar conditions in the future, not only goes far beyond the subject-matter of that decision, but creates an anomalous exception to the re-

medial powers of a court of equity. Such an interpretation of that decision in effect makes it say that when it comes to enforcing the provisions of the Interstate Commerce Act which are designed to secure reasonable and non-preferential rates, a court of equity has less power than it has with respect to the enforcement of any other duty created by law. The opinion in the case referred to was delivered by Mr. Justice Brewer, who also delivered the opinion in the Reagan case. That he entertains no such idea of a crippled or limited jurisdiction of courts of equity in the premises is strikingly shown by his dissenting opinion in the case of Missouri Pacific R'y v. United States, 189 U. S. 274. In that case the court held that the right to file a bill in the name of the United States, to prevent violation of the Interstate Commerce Act, without any prior investigation and order by the Interstate Commerce Commission, did not exist at the time the Circuit Court had entered its decree granting the relief prayed for in the bill; but that the Elkins Act of February 19, 1903, which had become a law before the Supreme Court decided the case, did authorize such a remedy. Mr. Justice Brewer, however, dissented on the ground that the right to maintain such a bill existed at the time the decree of the Circuit Court was entered. He said:

> "We held in In Re Debs, 158 U. S. 564, that the United States had a right, even in the absence of a statute specially authorizing such action, to come into the Federal courts by an original bill to restrain parties from obstructing and interfering with interstate commerce. It seems to me singular that the Government can maintain a bill to prevent others from obstructing and interfering with interstate commerce and yet can not maintain a bill to compel carriers to fully discharge their duties in respect to such commerce."

Mr. Justice Brewer pointed out that it was confessedly a common-law duty of a carrier to make no unreasonable charges, and that the bill alleged that the rates from St. Louis to Wichita were unreasonable, and added: "Surely here is a dis-

regard of what was at common law a plain and recognized duty of the carrier." Mr. Justice Brewer further said :

> "But beyond this the Interstate Commerce Act itself forbids unjust discrimination, and such discrimination is also clearly and fully set forth in the bill. Can it be that the Government is powerless to compel the carriers to discharge their statutory duties? It is nowhere said in the Interstate Commerce Act that this duty or any other duty prescribed by statute is to be enforced only through the action of the Commission. On the contrary, as we have seen, it expressly provides that all other remedies are left unaffected by the Act, and a duty cast by statute equally with a common-law duty may by the very language of the Act be enforced in any manner known to the law."

Mr. Justice Brewer further pointed out that the language of Section 12 of the Act "contemplates just such a case as the present, and when, in the judgment of the Commission, it is better that the proceedings should be had primarily in the courts, it may call upon the legal officers of the United States to bring the proper action."

It should be remembered that in this case the bill sought to correct for the future rates which were unreasonably high and unduly preferential, and specifically prayed that the respondent be enjoined from charging any greater rates to Wichita than to Omaha, from St. Louis. The entire court regarded the relief sought as within the powers of the court, and the very member of the court who in the cases in 154 U. S. and 167 U. S. used the language about the making of rates for the future being a legislative function was the most emphatic of all in his view that the court, in a litigated case before it, had the power to require the rates to be changed for the future so as to conform to the law.

There is no doubt that the usual governmental making of rates for the future is a legislative, not a judicial, function. The legislature itself can say, without any com-

plaint, response, or hearing, that not exceeding three cents per mile can be charged for the transportation of passengers. This will remain the maximum rate, no matter how conditions may change, unless, of course, the rate should become confiscatory, when the court would relieve against it. The fact that the legislature or its committee might first hear evidence and argument would not change the legislative character of the work. The legislature would not be bound by any rule of evidence. It could change the existing rate without proof that it was unlawful. It could change it for reasons of policy. A railroad commission would act in precisely the same way. It would act upon its general knowledge, and would not confine itself to the legal evidence presented in the particular investigation. All such rate-making is necessarily legislative in character, and is the sort of rate-making which the courts have had in mind when they have referred to the legislative character of future rate-making. Such a legislative rate is very different from the amount which a court in a litigated case upon legal evidence might find to be the maximum amount which the carriers could charge without violating the law, and which it might require to be observed in the future by the carriers, parties to that litigation, until conditions should change.

The case of Nebraska Telephone Company v. State ex rel. Yeiser, 55 Neb. 627 (45 L. R. A. 113), may be regarded as opposed to the views above expressed. In that case the relator sought by a mandamus to compel the telephone company to furnish him a telephone at the rate of three dollars per month, which was two dollars per month less than the rate at which the telephone company was willing to perform the service. The court held that the making of rates for the future was a legislative function, which the courts could not exercise. In considering that case it is important to bear in mind the following points :

1. The court first decided that a litigant would not be permitted to invoke the extraordinary remedy of mandamus when an express statute affords him an adequate remedy, and that under the statutes of Nebraska the Board of Transportation had express authority not only to redress all grievances for extortion and unjust discrimination by telephone companies, but to fix what compensation a telephone company should charge for services rendered by it, and that this constituted an express statutory remedy for the relator.

2. The court seemed largely influenced by the fact that the Nebraska Constitution conferred the entire regulation and control of the rates for the transportation of passengers and freight upon the Legislature, and therefore the court reasoned that the framers of the Constitution recognized that the entire power to control the compensation of public service corporations for the future was a legislative power. The court did not draw the obvious distinction between the legislative power to make rates generally and the judicial power inherent in the courts to enforce the observance of the laws which require reasonable rates, even though it might be necessary, as an incident to such enforcement, to find the maximum amount which must not be exceeded for the future under similar conditions.

3. It is apparent from the briefs filed in the case, as abstracted in 45 L. R. A., that the relator was really calling upon the court to reduce the rates according to principles which might be proper for a legislative tribunal, but which would be obviously improper for a judicial tribunal. It is clear that the argument was that the returns of the telephone company were higher than they should be and hence that the rates should be reduced. This was a question of public policy which the court had no power to determine, and which was, of course, legislative in character. So far as the briefs disclose, no proof was submitted to the court which would have been sufficient to justify a judgment even as to the past, because

obviously a court in determining a charge of extortion in the past could not hold a rate extortionate simply because the returns to the carrier had been large. The court would be confined to the determination of the question whether, according to admissible standards, the charge to the patron was unreasonably high. In other words, the court was really called upon to make rates in a legislative capacity and not to enforce in a judicial capacity an existing law that the rate charged the patron must be only just and reasonable according to judicial principles.

An instance frequently cited to show that the determining of maximum reasonable rates and giving effect to such determination constitute an exclusively legislative step which can not be exercised by a court, even when expressly authorized by the legislature, is the Kansas act creating the Court of Visitation, which act was declared to be unconstitutional by the United States Circuit Court for the District of Kansas in Western Union Telegraph Company v. Myatt, 98 F. R. 335, and by the Supreme Court of Kansas in State v. Johnson, 61 Kansas, 803 (60 Pac. Rep. 1068). This instance strikingly illustrates the vital distinction which must be made between that rate-making which is essentially legislative, and that action controlling rates for the future so as to make them conform to the law, which is of a judicial character.

The Kansas statute created the Court of Visitation, which it declared to be a court of record, and vested it with all the judicial attributes pertaining to a court. Among the powers sought to be conferred upon this court were the following, which are set forth in Section 8 of the statute:

(1) To try and determine all questions as to what are reasonable freight rates, switching and demurrage charges, and other charges connected with the transportation of property between points in this State. (2) To apportion charges between con-

necting roads, and determine all questions relating to charges for the use of cars and equipments; and to regulate the charges for part carload and mixed carload lots of freight, including live stock. (3) To classify freight. (4) To apportion transportation charges among connecting carriers. (5) To require the construction and maintenance of depots, switches, side-tracks, stockyards, cars, and other facilities for the public convenience. (6) To compel reasonable and impartial train and car service for all patrons of the railroad. (7) To regulate crossings and intersections of railroads, and to regulate the operation of trains over them. (8) To prescribe rules concerning the movements of trains to secure the safety of employes and the public. (9) To require the use of approved appliances and methods to avoid accidents and injuries to persons.

It is obvious that the terms used in this definition of powers are ordinarily applied to administrative or quasi-legislative powers relating to the subject of the regulation of public service corporations, and many of these powers are exclusively administrative or quasi-legislative in character. There could be no dispute, therefore, that one of the principal objects of the legislature was to confer far-reaching administrative or quasi-legislative powers upon this special court, and such powers as are ordinarily conferred upon railroad commissions.

The Circuit Court of the United States said:

> "It is apparent from even a cursory examination of those parts of the act of the legislature, which define the primary powers and jurisdiction of that body, that they are largely of a legislative or administrative character and such as do not pertain to the functions of a court . . .
>
> "Practically all of the powers then possessed by the Board of Railroad Commissioners of Kansas, which was purely an administrative body, were conferred upon the Court of Visitation, and as an evidence of the legislative purpose and intent the then existing laws relating to the appointment, powers, and duties of the Board of Railroad Commissioners were, by act of the legislature, repealed a

few days after the passage of the act creating the Court of Visitation. Both acts were passed at the same legislative session; the latter, by its terms, taking effect March 15, 1899, and the repealing act, by its terms, taking effect the first Monday of April of the same year." (98 Fed. Rep. 344, 345.)

That the legislature did not intend to confine the powers of the court to such powers as a court might properly exercise in actually litigated cases, is emphasized by the Circuit Court as follows:

> "Counsel say: 'The decision of a question which may arise between different railroad companies as to how much of a certain charge each shall have is as much a judicial function as to decide how much of an estate each of the heirs shall receive.'
>
> "That may be true where there is such a controversy pending in a court between the railroad companies themselves, but that is not the sense in which the power is conferred upon the Court of Visitation. The intent of the act of the legislature was, not to authorize the adjudication of distinct controversies of that character between contending railroad companies, but, instead thereof, the laying down of a rule in behalf of the State and the public, and the securing of the future obedience thereto by the imposition of fine and imprisonment. Is not that process legislation, and is not the result a regulation or a law?" (98 Fed. Rep. 346.)

The Supreme Court of Kansas pointed out that under the act the Court of Visitation could on its own motion, without complaint from any shipper, bring "before it for change and revision the entire schedule of freight rates over the whole system in Kansas of a great railway company." Of course no judicial tribunal could properly be empowered or permitted thus to proceed on its own motion.

Since, therefore, the Kansas statute was a plain case of attempting to confer upon a judicial tribunal the essentially

administrative and non-judicial duties ordinarily performed by railroad commissions or other administrative bodies or the legislature itself, the Federal Court and State Court both very properly held that such attempt was unconstitutional, and, in discussing it, appropriately used the language above quoted from Reagan v. Farmers Loan & Trust Company, 154 U. S. 362 ; Interstate Commerce Commission v. C., N. O. & T. P. R. R. Co., 167 U. S. 479, and similar cases.

Both courts characterized making rates for the future as a legislative function, and this was an eminently true characterization with respect to such rate-making as was contemplated by the Kansas statute. Neither court was called upon to consider, or did consider or discuss, what a court might properly do in a duly litigated case involving actual rights to compel a public service corporation to comply with an express common law or statutory duty. No such question could have arisen, because the statute was plainly wholly unconstitutional.

VII.

But even if after all it should be held that the determination, in a litigated case, of what is the maximum rate which can be charged under the law, and the enforcement of that rate for the future, under similar conditions, partake of the legislative rather than of the judicial character, it by no means follows that it would be unconstitutional for Congress to authorize the courts to perform that function.

In Luther v. Borden, 7 Howard, 1, the court had under consideration the constitutional provision that the United States should protect each State from domestic violence on the application of the legislature or of the executive when the legislature could not be convened. The court declared that it rested with

Congress to determine the proper measures for effecting this provision, and said :

> "They might . . . have placed it in the power of a court to decide when the contingency had happened which required the Federal Government to interfere."

But the court pointed out that Congress thought otherwise, and had given to the President the power to decide whether the exigency had arisen upon which the United States should interfere, and that his determination was final.

In Murray's Lessee v. Hoboken Land & Improvement Co., 18 Howard, 272, the court, while declaring that Congress could neither withdraw from judicial cognizance any matter which from its nature was the subject of a suit at the common law or in equity or admiralty nor bring under the judicial power a matter which from its nature was not a subject for judicial determination, said :

> "At the same time, there are matters involving public rights which may be presented in such form that the judicial power is capable of acting on them and which are susceptible of judicial determination, but which Congress may or may not bring within the cognizance of the courts of the United States, as it may deem proper."

In Smith v. Adams, 130 U. S. 167, the court held that the designation of a county seat in a territory or providing for its designation by popular election was "a matter properly belonging to the legislative department of the territorial government," but the court further held that if the legislature provided for a contest of the election in the courts the matter then "became the subject of judicial cognizance—a case or controversy . . . to which the judicial power of the territory attaches."

In Nishimura Ekiu v. United States, 142 U. S. 651, the court considered a statute which forbade certain classes of aliens

to land in the United States and authorized the inspector of immigration to pass upon the right of an alien to land and provided that the inspector's decision should be subject to no review except by appeal to the Commissioner of Immigration and the Secretary of the Treasury. The court held that the exclusion of aliens belonged to the political department of the Government and might be exercised either through treaties or statutes, and that the supervision of the admission of aliens might be intrusted by Congress to one of the executive departments, and that Congress might or might not authorize the courts to investigate and ascertain the facts on which the alien's right to land depended; and that when no such power was conferred upon the judiciary the decisions of executive or administrative officers acting within the powers expressly conferred by Congress constituted due process of law.

In Fong Yue Ting v. United States, 148 U. S. 698, the court considered a statute which provided for the expulsion of Chinese who failed to obtain a certificate of residence, as required by the statute, upon the order of a United States judge, unless it could be clearly established to the satisfaction of the judge that by reason of accident, sickness or other inevitable cause he was unable to procure his certificate and that he was a resident of the United States at the time of the passage of the Act. The court held that the right to expel aliens was vested in the political departments of the Government, to be regulated by treaty or by Act of Congress and to be executed by the executive authority and regulations so established, except so far as the judicial power might be authorized by treaty or statute to intervene; that therefore Congress might have directed any Chinese laborer to be removed out of the country by the executive officers without any judicial trial or examination, but further said :

> "When in the form prescribed by law the executive officer, acting in behalf of the United States, brings the

> Chinese laborer before the judge in order that he may be heard and the facts upon which depend his right to remain in the country decided, a case is duly submitted to the judicial power, for here are the elements of a civil case—a plaintiff, a defendant, and a judge."

In United States v. Duell, 172 U. S. 576, it was contended that Congress had no power to authorize the Court of Appeals of the District of Columbia to review the action of the Commissioner of Patents in an interference case, because the Commissioner was an executive officer and his decision of such a case was purely executive. The court, citing Murray v. Hoboken, etc., 18 Howard 272, 284, and Fong Yue Ting v. United States, 149 U. S. 698, held that it was within the power of Congress, at its option, to provide for the submission of a matter of this sort to a court.

In Stephens v. Cherokee Nation, 174 U. S. 445, 477, the court upheld a statute providing for an appeal to the courts from the decision of a commission, upon application of Indians for citizenship in any of the tribes living in the Indian Territory, although clearly these were matters which primarily belonged to the political departments of the Government, and could be finally passed upon by them.

In Salem Turnpike, etc., Co. v. County of Essex, 100 Mass. 282, the statute provided that the court should appoint commissioners to award damages to the Turnpike Company, whose property was to be taken for a public highway, and further authorized these Commissioners to apportion the damages among the counties and towns involved. It was claimed that it was a legislative power to apportion these damages among the counties and towns involved, which could not be exercised by the Court Commissioners, but the court said:

> "In respect to the provisions of the act for laying out the highway and making some division of the burden of maintaining it, the power indisputably belonged to the leg-

> islature, and it was in their power to make the provision complete, . . . And if the legislature found that the apportionment of the burden of providing this thoroughfare among several counties and towns required a more full and exact investigation than a committee of its own body could make, that the parties interested ought to have an opportunity to be heard by evidence and argument, and that there should be a legal judgment to determine the matter finally, they might properly institute an investigation of a judicial character. It would be analogous to a suit in equity in which many parties are interested and might properly be referred to a judicial tribunal. The subject-matter of the act is such that both legislative and judicial powers may properly be exercised in respect to it."

Thus it does not necessarily follow even where a subject is primarily of a legislative or administrative character that it is beyond the power of Congress to submit that subject to judicial instead of executive control, provided the subject is of such a character that it can be presented in a form suitable for judicial cognizance and is capable of determination according to established principles of judicial procedure. Inasmuch as the decision of the question of what is the maximum lawful rate which a common carrier may charge, upon the facts presented in the particular case, has always been a subject of judicial cognizance, it would seem perfectly clear from these decisions that Congress could provide for giving a future effect to such a decision of the court, even assuming that the court, without such express statutory authority, could not give such future effect to its decision.

It is not contended that Congress could confer upon the courts the power to explore and decide upon questions of mere business policy or expediency, such as might properly govern legislative action, but merely that when a court decides according to the settled principles of judicial procedure what is the maximum lawful rate in a case presented to it, it is certainly within the power of Congress to authorize the court to give a future effect to that decision.

It is difficult to see how any one can read the decisions of the Supreme Court of the United States without being impressed with the flexibility of the Federal Constitution and its adaptability to new conditions. To make the purely arbitrary distinction that the courts have full power to say whether the Interstate Commerce Act or the common law has been violated as to the past, and no effective power to prevent such violations for the future; and to say that Congress can not in its wisdom confer effective powers upon the courts for such purpose, is to go entirely contrary to the obvious current of Federal jurisprudence. Such a narrow and technical view of the capabilities of the judicial power would, if logically adhered to and applied to the capabalities of the legislative power, entirely undermine the supposed power to delegate the rate-making function to an administrative tribunal. The strictest construction of the respective powers of the three departments of the Government would, in any aspect of the matter, even if all control over rates for the future were of a legislative character, be less violated by empowering the courts in regularly litigated cases to decide, upon legal evidence, the extent to which existing rates violate the existing law and to give full effect to such decisions, under similar conditions, for the future, than by delegating the legislative power to make rates to an administrative bureau. The advocates of additional regulation are extremely liberal in construing the Constitution so as to sustain the delegation of legislative power to an administrative bureau. Equal liberality of construction would clearly sustain the conferring upon the courts of the power above indicated—even assuming that power to be primarily of a legislative character

However, it is not believed to be necessary to rely on the long line of cases which sanctions the exercise by the courts in a judicial way of many powers which may be primarily of a

legislative character, because the power here under consideration is in reality just as judicial as any other power which the courts habitually exercise in the enforcement for the future of the laws of the land.

I confidently submit, therefore, that those who contend that where a rate is condemned as unlawful there must be provision for declaring and enforcing what is lawful, ought not to assume that the Constitution shuts them up to the single method of regulation through a rate-making bureau, but that it is also open to them to accomplish through the courts all specific correction in rates which may be necessary to render those rates lawful. If this proposition of law be established (and this paper is addressed solely to that question), then the question of expediency remains, Which is the safer and fairer method of regulation?

Personally, I believe that the prompt and effective enforcement of the purely preventive remedy now provided by the Act to Regulate Commerce, whereby the courts may order the discontinuance for the future of all unlawful rates, is ample to secure the substantial correction of every interstate railroad rate which is unreasonably high or unduly preferential and therefore forbidden by that act. I believe that the decrees of the courts finding existing rates to be unlawful and ordering their discontinuance will be, and in the nature of things must be, complied with by the carriers making such reductions or modifications as will substantially meet the courts' views as to what is reasonable. This view is fully supported by the experience under the Act to Regulate Commerce. Unless the carriers have believed the orders of discontinuance made by the Commission to be clearly unlawful, they have at the outset complied with those orders in a very substantial way

without necessitating any resort to the courts at all, and in the exceedingly few cases where the courts have been called upon to decree the enforcement of the lawful orders of the Commission the courts' decrees of discontinuance have been invariably complied with in a substantial manner. Thus under the present law the courts can, and do, exercise very substantial, and, in my opinion, entirely adequate, control over rates for the future. I do not, therefore, believe it is necessary or expedient to provide for additional control over rates for the future.

While railroad companies are engaged in a quasi-public business, and therefore subject to all necessary regulation, they are still operated by, and entirely at the risk of, private capital, and I think there should be no more regulation than is reasonably necessary to give the public adequate protection, and I firmly believe that the purely preventive process of the law is all that is necessary or expedient.

But as Congress is considering the advisability of supplementing this purely preventive process by legislation which shall provide that when the duly authorized tribunal finds a rate unlawful it may declare and enforce for the future the rate that is lawful, it is extremely important to understand clearly what tribunals are available for that purpose under the Constitution.

WALKER D. HINES.

LOUISVILLE, KY., June 24, 1905.